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In the
Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-1662

CHEVRON U.S.A. INC., ET AL.,

Petitioners

Versus

CECIL D. ANDRUS, SECRETARY, DEPARTMENT OF THE INTERIOR, ET AL.,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Chevron U.S.A. Inc., formerly Chevron Oil Company, Allied Chemical Corporation, SONAT Exploration Company, The Offshore Company, TransOcean Oil, Inc. and Unidel Oil Company (hereinafter collectively "Chevron") petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Opinions Below

The opinion of the Court of Appeals (App., infra, p. A-1) is reported at 588 F.2d 1383. The opinion denying rehearing (App., infra, p. A-22) is not yet reported. The unreported opinion of the District Court is found in the Appendix (App., infra, p. A-24).

Jurisdiction

The judgment of the Court of Appeals was dated and entered on February 9, 1979. Rehearing was denied on March 8, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Question Presented

Whether the head of a federal agency, when he has delegated his discretionary decision-making authority to a subordinate and has provided for review within the agency of a decision of the subordinate, can make the decision himself and thereby foreclose administrative review or whether he must permit the subordinate to make the decision.

Regulations Involved

The regulations with respect to the award of leases issued pursuant to the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 et seq, are administered by the Bureau of Land Management ("BLM"). Decisions with respect to the award of leases are made by the "authorized officer." 43 C.F.R. (1977) §3302.5 provides:

> *Awards of leases will be made only by written notice from the authorized officer.* Such notices shall transmit the lease forms for execution . . . *If the authorized officer fails to accept the highest bid* for a lease within 30 days after the date on which the bids are opened, all bids for that lease will be considered rejected. Notice of *his* action will be transmitted promptly to the several bidders. (43 C.F.R. (1977) § 3302.5) (Emphasis added.)

Insofar as leases in the Gulf of Mexico are concerned, the Manager, Gulf of Mexico OCS Office, BLM (the "Manager"). was the authorized officer. The Secretary of the Interior delegated his authority to the Director, BLM, who in turn delegated this authority to the Manager. Secretary of the Interior Order No. 2583, part 2, § 1.26, 15 Fed. Reg. 5643 (1950), as amended 27 Fed. Reg. 2862 (1962) provides:

> The Director . . . is hereby authorized to take all actions . . . with respect to . . . mineral leases pursuant to the Act of August 7, 1953. (67 Stat. 462; 43 U.S.C. § 1331, et seq.) [The OCS Lands Act]

The redelegation from the Director to the Manager is identical except that it limits the Manager's authority to the Gulf of Mexico. BLM Order No. 701, § 4.6(b), as amended, 30 Fed. Reg. 9214 (1974).[1]

Decisions of the Manager may be appealed to the Board of Land Appeals:

> [E]xcept where a decision has been approved by the Secretary, any party to a case who is adversely affected by a decision of an officer of the Bureau of Land Management . . . shall have a right to appeal to the Board. (43 C.F.R. § 4.410.)
>
> The Board decides finally for the Department appeals . . . relating to . . . the use and disposition of mineral resources . . . in the submerged lands of the Outer Continental Shelf. (43 C.F.R. § 4.1(3).)

1. In *Superior Oil Company v. Udall,* 409 F.2d 1115, 1119 (App. D.C. 1969) the Court discussed substantially identical delegations then in force and held that the Manager was the "authorized officer."

Statement of the Case

At OCS Lease Sale No. 37, Chevron was the high bidder for two oil and gas leases on the Outer Continental Shelf. The Deputy Under Secretary, acting for the Secretary, decided to reject Chevron's bids. Chevron brought suit for judicial review. Jurisdiction was based on 43 U.S.C. § 1333(b) and 28 U.S.C. § 1331(a). On Motion for Summary Judgment, Chevron contended that under the regulations of the Department, it was entitled to a decision, not by the Deputy Under Secretary (or for that matter the Secretary), but by the Manager. The District Judge agreed. Inasmuch as it was the Manager's judgment that Chevron's bids should have been accepted, the District Judge ordered respondents to award the leases. The Fifth Circuit reversed, holding that the Deputy Under Secretary properly could make the decision.

Reasons for Granting the Writ

The decision of the Court of Appeals is in conflict with the decisions of this Court and will lead to erosion in the quality of agency decision-making.

Administrative agencies have been vested with greater and greater discretionary authority to make decisions affecting both the economy and individual rights. Agency heads have generally delegated discretionary authority to expert subordinates and have provided for review within the agency of decisions of the subordinates. Such decision-making procedures are designed to preclude *ad hoc* decision-making, to insure that parties affected by agency action will have an opportunity to make their position heard, and to insure that the agency decision will be based on a consideration of all

relevant factors and will represent an informed choice among competing alternatives. Though this Court has carefully refrained from exercising substantive control over administrative discretion, it has been at pains to require the established decision-making procedures be followed and that procedural safeguards designed to protect private parties against ill considered agency action be observed. *Morton v. Ruiz*, 415 U.S. 199, 232 and 235, 39 L.Ed.2d 270, 292 and 293 (1974); *Service v. Dulles*, 354 U.S. 363, 1 L.Ed.2d 1403 (1957); *Vitarelli v. Seaton*, 359 U.S. 535, 3 L.Ed.2d 1012 (1959). See also, *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 28 L.Ed.2d 136 (1971). In this connection, the Court has refused to permit an agency head to reduce a two-tiered decision-making procedure to a one-step procedure. It has held that, when an agency head has delegated discretionary decision-making authority to a subordinate and has provided for review of the subordinate's decisions within the agency, the agency head cannot sidestep the subordinate and make the decision himself thereby foreclosing agency review. *Accardi v. Shaughnessy*, 347 U.S. 260, 98 L.Ed. 681 (1954). Under such circumstances, the agency head denies himself the authority to make the agency decision and must permit the subordinate to make it. *United States v. Nixon*, 418 U.S. 683, 695, 41 L.Ed.2d 1039, 1057 (1974).

Here, the Secretary of the Interior had delegated his authority to accept or reject high bids to the Director, BLM, who had redelegated it to the Manager, an admitted expert on matters pertaining to the sufficiency of high bids on OCS tracts.[2] The Secretary had provided that a party adversely

2. See regulations quoted at p.2-3,supra. Mr. John L. Rankin has been Manager since 1959. Mr. Rankin was instrumental in devising the procedure and method by which bid adequacy determinations are made; he has accepted or rejected thousands of high bids on OCS leases.

affected by a decision of the Manager could appeal to the Interior Board of Land Appeals.[3] Yet, the Deputy Under Secretary, who had little or no previous experience in the evaluation of OCS bids, sidestepped the Manager, made the initial decision himself, and foreclosed prescribed administrative review.

Contrary to the opinion of the Fifth Circuit, the regulations of the Secretary, equally with the regulations of the Attorney General considered in *Accardi*, required that the subordinate make the initial decision. In *Accardi*, as here, the regulations did not make this requirement in so many words. Rather, the regulations delegated the discretion of the agency head to the Board of Immigration Appeals and provided for review of the Board's decision. From these provisions, the Court in *Accardi* reasoned that the Board was required to make the initial decision. It said:

> The regulations just quoted pinpoint the decisive fact in this case: the Board was required, as it still is, to exercise its own judgment when considering appeals. *The clear import of broad provisions for final review by the Attorney General himself would be meaningless if the Board were not expected to render a decision in accord with its own collective belief. In unequivocal terms the regulations delegate to the Board discretionary authority as broad as the statute confers on the Attorney General; the scope of the Attorney General's discretion became the yardstick of the Board's.* And if the word "discretion" means anything in a statutory or administrative grant of power, it

3. 43 C.F.R. § 4.410 and § 4.1(3), p. 3, supra.

> means that the recipient must exercise his authority according to his understanding and conscience. This applies with equal force to the Board and the Attorney General. *In short, as long as the regulations remain operative, the Attorney General denies himself the right to sidestep the Board or dictate its decision in any manner.* (347 U.S. 266-67, 98 L.Ed. 686.) (Emphasis added.)

Although the regulations of the Secretary, unlike those of the Attorney General, did not state that the Manager in making his decision "shall exercise such discretion and power conferred upon the . . . [agency head] by law as is appropriate and necessary for the disposition of the case," repeated Interior decisions demonstrate that the Secretary's discretion was vested in the Manager.[4] Indeed, the regulations vested in the Manager authority as broad as the statute vested in the Secretary. Moreover, to paraphrase *Accardi*, the clear import of broad provisions for final review by the Board of Land Appeals of decisions of the Manager would be meaningless if the Manager were not expected to render a decision in accordance with his own belief. The regulations would hardly have stated that the Board of Land Appeals "decides finally for the Department appeals . . . relating to the . . . disposition of the mineral resources . . . in the submerged lands of the Outer Continental Shelf", 43 C.F.R.

4. *Sun Oil Corporation, et al* (June 23, 1968); *Humble Oil and Refining Company* (July 28, 1969); *Chevron Oil Company* (July 29, 1969); *Humble Oil and Refining Company*, 4 IBLA 72 (November 8, 1971); *Kerr-McGee Corporation, et al*, 6 IBLA 108 (June 5, 1972); *Tipperary Land and Exploration Corporation*, 7 IBLA 270, 79 ID 596 (September 19, 1972); *Domino, Antoine "Fats"*, 7 IBLA 375 (September 29, 1972); *Exxon Company U.S.A., et al*, 15 IBLA 345 (May 14, 1974); *Consolidated Gas Supply Corporation, Opinion of the Secretary* (June 25, 1975); and *Alaska Oil & Mineral Corporation*, 29 IBLA 224, 84 ID 114 (1977).

§4.1(3), if the initial decision were to be made not by the Manager, but by a Secretarial Officer from whom there is no appeal. Where, as here, regulations "confer important procedural benefits upon individuals in the face of otherwise unfettered discretion," the individual or other private party is entitled that the regulations be followed. *American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532, 538-539, 25 L.Ed.2d 547, 553 (1970).

Prior statements of the Interior Department confirm that the initial decision would be made by the Manager. The Bureau of Land Management-Geological Survey Joint Agreement on Evaluation Procedures for OCS Lease Sales, dated December 28, 1971, provides:

> The BLM OCS Manager makes the decision as to whether leases shall issue.

The "Outline of Offshore Lease Sale Procedure - Sale #37 - February 4, 1975" similarly provides:

> After complete review and analysis of all available data, the Manager shall make a decision as to whether the leases shall issue.

Mr. Ken M. Brown, legislative counsel for the Department of the Interior, responding by letter dated February 27, 1973 to questions asked the Department of the Interior by Hon. Henry M. Jackson, Chairman, Committee on Interior and Insular Affairs, United States Senate, stated:

> Decisions of the Bureau of Land Management to accept or reject high bids for OCS leases are made by the BLM OCS field office manager who has the responsibility for determining whether leases should issue . . . . Decisions rejecting bids are subject to appeal to the Department's Board of Land Appeals. The decision of the Board constitutes the final administrative determination of the Government.[5]

The decision in *Accardi* turned on the critical distinction between the authority of an agency head to review a decision once it has been made and the authority of an agency head to make the initial decision himself. As noted by the dissenters, the agency head, in either case, has the last say. But the difference is not thereby reduced to a procedural nicety. Here the Deputy Under Secretary, because he made the initial decision, substituted his judgment for the Manager's. He took the Manager's independent judgment merely as one among several recommendations which he was free to follow or not as he saw fit. If, instead, he had limited his participation to review of the Manager's decision, he would have examined the decision to ascertain whether there were compelling reasons for it to be reversed. The Interior Board of Land Appeals has established the rule that, on review, a decision of an expert subordinate, like the Manager, will be affirmed in the absence of such reasons. In *Eason Oil Company*, 24 IBLA 221, 225 (1976) and *Rosita Trujillo*, 21 IBLA 289, 291 (1975), it stated:

> [W]here the responsibility for making . . . judgments has been exercised by an officer duly delegated with the authority to do so, his action will

5. See Hearings before the Committee on Interior and Insular Affairs, United States Senate, Second Session, on Federal leasing Policies and Issues Governing the Management and Development of Energy Resources on the Public Lands, June 19, 1972, p. 255.

> ordinarily be affirmed in the absence of a showing of compelling reasons for modification or reversal.

The rule established by the Board is consistent with the decision of Secretary Hathaway in *Consolidated Gas Supply Corporation*, (June 25, 1975). There the Secretary, exercising his authority under 43 C.F.R. 4.5 to assume jurisdiction of a case pending before the Board, affirmed the decision of the Manager to reject a high bid on an OCS lease. Secretary Hathaway said:

> The contention that the Manager does not have the discretion under the OCS Act to reject a proper and lawful high bid of a qualified, responsible bidder is contrary to *Superior Oil Company v. Udall*, 409 F.2d 1115, 1121 (D.C. Cir. 1969), and merits no discussion. Therefore, *the Manager's decision of rejection would have to be unreasonable, unjust, and improper under the circumstances to amount to an abuse of discretion.* (Emphasis added)

If the two-tiered decision-making procedure contemplated by the regulations had been followed, the initial review of the decision whether to accept Chevron's bids would have been in the agency, not the Courts. In the agency, Chevron would have enjoyed the benefit of a favorable initial decision. In the District Court to which the Fifth Circuit has remanded this cause, Chevron will be faced with an adverse agency decision. The burden will be shifted to Chevron to show that the decision was wrong and, indeed, arbitrary and capricious. In almost every case in which an agency decision involves the

exercise of discretion, such a shift is of critical importance. It was here. In its brief, Interior stated that Chevron's bids fell in a "grey area" (Appellants' brief, p. 6) and that the decisions to accept or reject were "close calls" (Appellants' brief, p. 34). The District Judge held: "[P]laintiffs' [Chevron's] bids were roughly in a range wherein the decision by the authorized officer was discretionary and would be overturned only for abuse of discretion." (App. infra, p. A. 26.)

Chevron does not here dispute that the Secretary, because he retained supervisory authority, could review the decision of the Manager. It does dispute that he could properly take the initial decision from the Manager's hands. The regulations which were considered in *Accardi*, like almost all administrative regulations which delegate authority, reserved to the agency head the power of "supervision and direction." The dissenters in *Accardi* urged, *inter alia*, that, because the agency head had "supervision and direction" of his subordinate, the plaintiff could not complain that the agency head had "over influenced" the subordinate's decision. (347 U.S. at 269-70, 98 L.Ed. at 688.) This argument was rejected by the majority whose opinion is a cornerstone of modern administrative law.

The rule of *Accardi* was reaffirmed in *United States v. Nixon*, 418 U.S. 683, 41 L.Ed.2d 1039, 1057 (1974):

> In United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 98 L.Ed. 681, 74 S.Ct. 499 (1954), regulations of the Attorney General delegated certain of his discretionary powers to the Board of Immigration Appeals and required that Board to exercise its own discretion on appeals in deportation cases. The Court held that *so long as the*

Attorney General's regulations remained operative, he denied himself the authority to exercise the discretion delegated to the Board even though the original authority was his and he could reassert it by amending the regulations. Service v. Dulles, 354 U.S. 363, 388 1 L.Ed.2d 1403 (1957), and Vitarelli v. Seaton, 359 U.S. 535, 3 L.Ed.2d 1012 (1959), reaffirmed the basic holding of Accardi. (Emphasis added.)

Conclusion

The issue presented in this case cuts across the entire field of administrative law and will determine whether, under the regulations of most agencies, an agency head may sidestep a subordinate to whom he has delegated discretionary decision-making authority, make the decision himself, and thereby cut off all administrative review, deproving private parties of an initial decision by an expert and of important procedural benefits. Because agency decisions touch almost every aspect of modern day life, matters related to individual liberty as well as to economic regulation, the dangers created by *ad hoc* decisions which do not reflect informed consideration of all relevant factors are great and the need for adherence to regulations which insure that decisions will be made carefully after all parties are heard is still greater. Should this Court fail to grant

certiorari, the holding in *Accardi*, which has fostered responsible decision-making, will be undercut at a time when strict adherence to its precepts is essential.

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May, 1979

APPENDIX A
OPINION OF COURT OF APPEALS

CHEVRON OIL COMPANY, et al.,
Plaintiffs-Appellees

v.

Cecil D. ANDRUS, Secretary, Department of the Interior et al.,
Defendants-Appellants.

No. 77-2186.

United States Court of Appeals, Fifth Circuit.

Feb. 9, 1979.

The United States District Court for the Eastern District of Louisiana, R. Blake West, J., issued an injunction forbidding the rejection of certain oil and gas lease bids by the Department of Interior. On appeal, the Court of Appeals, Tjoflat, Circuit Judge, held that Department of Interior acted in conformity with its regulations in rejecting oil and gas lease bids submitted pursuant to the Outer Continental Shelf Lands Act even though the manager of Outer Continental Shelf Office for the Department of Interior recommended acceptance of bids.

Reversed and remanded.

1. Administrative Law and Procedure - 303

Whether an administrator has deprived himself of power to act is dependent on particular terms of regulation.

2. Mines and Minerals - 5.1(1)

Department of Interior acted in conformity with its regulations in rejecting certain oil and gas lease bids submitted pursuant to the Outer Continental Shelf Lands Act even though the manager of Outer Continental Shelf Office for Department of Interior recommended acceptance of bids. Outer Continental Shelf Lands Act, § § 1-15, 8(a), 43 U.S. C.A.§ § 1331-1343, 1337(a).

3. Mines and Minerals - 5.1(9).

Determination of Department of Interior as to acceptance or rejection of oil and gas lease bids submitted pursuant to Outer Continental Shelf Lands Act is subject to judicial review. 5 U.S.C.A. § 551 et seq.; Outer Continental Shelf Lands Act, § § 1-15, 8(a), 43 U.S.C.A. § §1331-1343, 1337 (a).

Appeal from the United States District Court for the Eastern District of Louisiana.

Before BROWN, Chief Judge, GEWIN and TJOFLAT, Circuit Judges.

TJOFLAT, Circuit Judge:

This case requires us to construe the Department of Interior's regulations for the leasing of oil and gas development rights on the nation's outer continental shelf. The question presented is whether the Department has bound itself by regulation to abide by the unreviewed action of a regional

manager in the evaluation of bids for leases. The district court held in the affirmative and on this basis issued an injunction forbidding the rejection of Chevron Oil Company's bids. We reverse.

I. *Facts*

Outer Continental Shelf (OCS) Oil and Gas Lease Sale No. 37 was held in New Orleans, Louisiana on February 4, 1975. Appellees (hereinafter Chevron) were the highest bidders on two of the tracts offered for lease. After the public opening of bids, the Gulf of Mexico OCS Office, Bureau of Land Management (BLM), Department of Interior, in accordance with its usual practice, prepared statistical analyses of the bids received. On the basis of this analysis, Mr. John Rankin, Manager of the Office, recommended that Chevron's bids be accepted.[1] The Director, BLM also recommended acceptance. The Assistant Secretary for Land and Water Resources, Department of Interior, recommended that the bids be rejected as inadequate. Deputy Under Secretary of the Interior William W. Lyons, whose action was final for the Department in this matter, decided that Chevron's bids should be rejected. Pursuant to this determination, Chevron was notified in writing by Mr. Rankin on February 25, 1975, that its high bids on the two tracts had been rejected.[2]

Requests for reconsideration were made to the Secretary of Interior but denied. Appellees then filed these suits seeking a declaration that they are entitled to the leases and an

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1. Mr. Rankin also had before him the recommendation of the Acting Conservation Manager, Gulf of Mexico OCS Operations, Geological Survey that the bids be rejected.

2. There is no question that Chevron was a qualified bidder. The United States,however, in both the public notice of sale, 40 Fed. Reg. 804 (1975), and the Department of Interior Regulations, 43 C.F.R. 3302.5 (1977), reserved the right to reject any and all bids.

order directing that the leases be issued. On cross motions for summary judgment, the district court held that under the Department's regulations Mr. Rankin is the official whose decision to accept or reject high bids is controlling ; Mr. Rankin, in the exercise of his independent judgment, concluded that Chevron's bids should be accepted, and that judgment could not be overruled by the Secretary or any subordinate acting for him. These appeals followed, and the order to issue the leases has been stayed pending our decision.

II. *The Regulatory Scheme*

Statutory authority for the letting of oil and gas leases is found in the OCS Lands Act, 43 U.S.C. § § 1331-43 (1970), section 8(a) of which provides:

> In order to meet the urgent need for further exploration and development of the oil and gas deposits of the submerged lands of the outer Continental Shelf, the Secretary [of the Interior] is authorized to grant to the highest responsible qualified bidder by competitive bidding under regulations promulgated in advance, oil and gas leases on submerged lands of the outer Continental Shelf . . ..

43 U.S.C.§ 1337(a) (1970). Interior's regulations for mineral leases on the OCS appear at 43 C.F.R. Part 3300 (1977). The award of leases is covered by section 3302.5:

> § 3302.5 Award of lease.
>
> Sealed bids received in response to the Notice of Lease Offer shall be opened at the place, date and hour specified in the notice. The opening of bids is for the sole purpose

> of publicly announcing and recording the bids received and no bids will be accepted or rejected at that time. In accordance with section 8 of the [OCS Lands] Act, leases will be awarded only to the highest qualified responsible bidder. The United States reserves the right and discretion to reject any and all bids received for any tract, regardless of the amount offered. Awards of leases will be made only by written notice from the authorized officer. . . . If the authorized officer fails to accept the highest bid for a lease within 30 days after the date on which the bids are opened, all bids for that lease will be considered rejected. Notice of his action will be transmitted promptly to the several bidders.

The Secretary has delegated administration of these regulations as follows:

> Subject to the supervisory authority of the Secretary, the regulations in this part shall be administered by the Director, Bureau of Land Management, hereinafter referred to in this part as the Director.

43 C.F.R. § 3300.0-3 (1977)

The "authorized officer" in section 3302.5 is defined in 43 C.F.R. 3000.0-5(f) as "any person authorized by law or by lawful delegation of authority in the Bureau of Land Management to perform the duties described." The Director, BLM has been authorized "to take all actions . . . with respect to [OCS mineral leases]," Secretary of Interior Order No. 2583, Part 2, §2.36, 15 Fed. Reg. 5643 (1950), *as amended*, 27 Fed. Reg. 2862 (1962), and the Director has in turn authorized the Manager, Gulf of Mexico OCS Office to act with respect to leases in the Gulf of Mexico, Bureau of Land

Management Order No. 701 § 4.6(b), *as amended*, 39 Fed. Reg.9213 (1974). Mr. Rankin has been the Manager of the Gulf of Mexico OCS Office since 1959.

Chevron's argument, accepted by the court below, is straightforward. Read as a whole, regulations vest the authority to award or withhold leases in the "authorized officer." Mr. Rankin, by delegation, is the authorized officer for Gulf of Mexico leases; therefore, the argument goes, his decision to accept Chevron's bids was binding on the Department, in the absence of a specific regulation permitting the Secretary or anyone acting for him[3] to overrule Mr. Rankin. Primary reliance is placed on the case of *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 74 S.Ct. 499, 98 L.Ed. 681 (1954), for the proposition that an executive officer who by regulation vests his discretionary authority in a subordinate thereby deprives himself of the power to make the decision himself. Chevron argues that here the Secretary may amend the regulations and revest in himself the authority to issue or deny leases, but so long as the present regulations stand, Mr. Rankin's decisions are controlling.

This argument, in our view, misconstrues Interior's regulations and misreads *Accardi*. In that case, regulations of the Attorney General delegated to the Board of Immigration Appeals certain of his discretionary powers in deportation cases and required that

3. Throughout this opinion "Secretary" refers to the Secretary of the Interior and those secretarial officers authorized to exercise his power, which, in this case, includes the Assistant Secretary and the Deputy Under Secretary who acted on these leases.

> "[i]n considering and determining . . appeals, the Board of Immigration Appeals shall exercise such discretion and power conferred upon the Attorney General by law as is appropriate and necessary for the disposition of the case. The decision of the Board . . shall be final except in those cases reviewed by the Attorney General [as further provided for herein]."

347 U.S. at 266, 74 S.Ct. at 503 (quoting 8 C.F.R. § 90.3(c) (1949)). The Court held that the regulations required the Board to exercise its own judgment in considering appeals, and "as long as the regulations remain operative, the Attorney General denies himself the right to sidestep the Board or dictate its decision in any manner." *Id.* at 267, 74 S.Ct. at 503. The Attorney General had dictated the Board's decision in Accardi's case by including his name in a list of "unsavory characters" whom the Attorney General wanted deported and circulating the list to the Board members prior to their decision on Accardi's appeal. Accordingly, the Court ordered a new hearing at which the Board was to exercise its own independent judgment, as the regulations required.

We think *Accardi* stands for the unremarkable proposition that an agency must abide by its own regulations. *See Service v. Dulles*, 354 U.S. 363, 372, 77 S.Ct. 1152, 1157, 1 L.Ed.2d 1403 (1957). Where, as in *Accardi*, the regulations vesting discretion in a subordinate require that subordinate to exercise his independent judgment, the administrator must permit him to do so, but the question in each case is what do the regulations require and has the agency complied with them. In *Accardi*, the Court found that the language of the regulations ("the Board . . . *shall* exercise such discretion" (emphasis added)) required the Board to arrive at an independent decision, subject to review by the Attorney General in

specified instances. The regulations conferred important due process rights upon petitioners before the Board which the Attorney General could not violate by interfering *prior* to the Board's decision and dictating the result. The Court said nothing about the circumstances under which the Attorney General could review and reverse a decision once it had been made by the Board. *Accardi* says only that, where applicable regulations so provide, an angency head must permit his subordinate, as an initial matter, to make an independent judgment without interference. *Service v. Dulles*, 354 U.S. at 386, 77 S.Ct. at 1164 (in *Accardi*, "the Attorney General bound himself not to exercise his discretion until he had received an impartial recommendation from a subordinate board"); *Marcello v. Bonds*, 349 U.S., 302, 311, 75 S.Ct. 757, 762, 99 L.Ed. 1107 (1955) (issue in *Accardi* was "prejudgment").

[1] *United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974) did not modify *Accardi's* holding. One issue in that case was whether a justiciable controversy existed. In the course of its analysis, the Court said:

> In *United States ex rel. Accardi v. Shaughnessy* 347 U.S. 260, 74 S.Ct. 499, 98 L.Ed. 681 (1954), regulations of the Attorney General delegated certain of his discretionary powers to the Board of Immigration Appeals and required that Board to exercise its own discretion on appeals in deportation cases. *The Court held that so long as the Attorney General's regulations remained operative, he denied himself the authority to exercise the discretion delegated to the Board* even though the original authority was his and he could reassert it by amending the regulations.

Id. at 695-96, 94 S.Ct. at 3101 (emphasis added). The emphasized language does not mean, as Chevron contends, that every delegation deprives the delegator of the power assigned. The discussion of *Accardi* quoted *supra* was immediately preceded by the statement: "So long at [a] regulation is extant it has the force of law." *Id.* at 695, 94 S.Ct. at 3101. *Nixon* simply reaffirms *Accardi's* holding that an agency is bound by its regulations. Whether an administrator has deprived himself of the power to act is dependent on the particular terms of the regulation.[4] The Secretary of Interior is bound by Mr. Rankin's determination only if the Department's regulations so provide. We think they do not.

The regulations here are quite different from those in *Accardi* or *Nixon*. *First*, nowhere do they require the authorized officer to make an initial independent decision. We agree with Chevron that Mr. Rankin has the authority to act for the Department regarding these leases, but nowhere is he compelled to do so.[5] He may accept or reject leases with-

4. In *Nixon* the regulation provided in no uncertain terms that the Special Prosecutor had full authority to contest the assertion of Executive Privilege and prosecute his cases without interference. *Id.* at 694-95, n.8, 94 S.Ct. at 3100-01. The Court held that the President's refusal to comply with the Special Prosecutor's subpoena presented a justiciable issue since the Special Prosecutor was acting within his authority under the regulation.

5. Nor do we think he purported to do so in this case. Mr. Rankin memorialized the results of his post-sale analysis by placing an "A" (meaning accept) in the column marked "BLM/N.O." opposite the entries for Chevron's two bids on the Consistency Matrix and by placing check marks in the "accept" column on the Sale Matrix, two documents prepared as part of the post-sale analysis. The parties disagree as to whether this was a "decision" or merely a "recommendation" to accept the bids. Had Mr. Rankin sought to act authoritatively for the Department, he would have had to send Chevron a written notice, the only means by which leases can be awarded under the regulations. He did not do so.

out seeking the approval of his superiors, but he is not precluded from seeking such approval. *Second*, even if he were so compelled, no one interfered with his exercise of independent judgment in this case. There was no attempt to influence his determination in advance. As we have explained, this is all that *Accardi* requires. *Third*, we think there is merit to Interior's contention that designation of Mr. Rankin as an authorized officer under section 3302.5 does not deprive the Secretary of the power to review and revise his determinations before they are communicated to the bidders. *Cf. The Skokomish Indian Tribe v. General Services Administration*, 587 F.2d 428, 431-432 (9th Cir. 1978) (Secretary of the Interior may withdraw request by subordinate agency to GSA for transfer of "excess" property any time prior to actual transfer). No decision binding on the Department is made until written notice is sent to the bidders or 30 days pass without a decision.[6] To review and overrule the recommendation of a subordinate is not to dictate or "sidestep" his decision within the meaning of *Accardi*. Here, Interior's Regulations explicitly provide that the BLM administers the leasing regulations "subject to the supervisory power of the Secretary."[7] Moreover, Interior's Departmental Manual provides that "[a]n officer who delegates or redelegates authority does not divest himself of the power to exercise that

6. Where the BLM acts without the participation of a Secretarial officer, an appeal lies to the Board of Land Appeals. 43 C.F.R. §4.410 (1977).

7. Chevron contends that the reservation of supervisory power is unavailing. It cites *Accardi*, where the majority was not persuaded that a similar reservation supported the Attorney General's action. As we have gone at length to point out, the cases are quite different. Supervisory power cannot justify prior interference with a subordinate required to act independently. It is the essence of supervisory power, however, to review and revise the judgments of subordinates after they are made.

authority." 200 D.M. § 1.3 (1970).[8]

We think it clear that sole decisional authority was not conferred upon Mr. Rankin by Interior's regulations. Even if we ignored the Departmental Manual we would be most reluctant to accept Chevron's argument, for,

> [a]s a general propsotion of administrative law, the head of an administrative agency has the power to review and revise acts of subordinates where, as here, the powers in question are vested in the subordinate under the supervision and direction of the superior or the power to administer is vested in the superior.

Morrow v. Clayton, 326 F.2d 36, 45-46 (10th Cir. 1963), (citing *Knight v. United Land Association*, 142 U.S. 161, 12 S.Ct. 258, 35 L.Ed. 974 (1891)). To hold otherwise would create havoc in the administration of our laws.

Superior Oil Co. v. Udall, 133 U.S. App. D.C. 198, 409

8. Chevron argues that Interior is precluded from relying on this provision because it was not published in the Federal Register as required by 5 U.S.C. § 552(a)(1) (1976). We do not agree. By its own terms, section 552(a)(1) requires only that a person may not "be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published." Thus, it has been held that this section's "requirement for publication attaches only to matters which if not published would adversely affect a member of the public," *Hogg v. United States*, 428 F.2d 274, 280 (6th Cir. 1970), *cert. denied*, 401 U.S. 910, 91 S.Ct.871, 27 L.Ed.2d 808 (1971), or which affect the steps a party must take to present a matter to the agency, *Pasco, Inc. v. Federal Energy Administration*, 525 F.2d 1391, 1405 (Temp. Emer. Ct. App. 1975). The provision in Interior's manual does not relate to the manner in which bids must be submitted. Nor was Chevron adversely affected by its nonpublication. We do not believe that knowing that the Secretary could participate in a decision to reject a bid would have induced Chevron to bid more than it did, and only a higher bid would have influenced the Deputy Under Secretary's decision.

F.2d 1115 (1969) is not to the contrary. There, the D.C. Circuit held that Interior was bound by Mr. Rankin's *rejection* of a bid. Then, as now, Mr. Rankin was Manager of the Gulf of Mexico OCS Office. At the opening of bids, Mr. Rankin announced that one high bid was not acceptable because not signed by the bidder. The court held that the Secretary could not subsequently excuse the omission and accept the bid. Crucial to the decision in the case was the language of the regulations then in force:

> Following the public opening of the sealed bids as provided in the notice of lease offer, the *authorized officer*, subject to *his right to reject any and all bids* will award the lease to the successful bidder.

133 U.S. App. D.C. at 202, 409 F.2d at 1119 (quoting 43 C.F.R. § 3382.5) (emphasis in original). The regulations clearly established the right of the authorized officer to accept or reject bids at the time of their opening. The court simply held that, in view of the substantial interest of the public and the bidders in certainty in the bidding procedures, the Secretary could not override the Manager's publicly announced rejection of a bid. Largely in response to the *Superior Oil Co.* decision, the regulations were amended to their present form. They now preclude the oral acceptance or rejection of bids at the opening; leases may only be awarded by written notice. No written notice was ever sent to Chevron accepting its bids; therefore the Department never committed itself to accept them. *Superior Oil Co.* is simply irrelevant to the present case.

[2] We hold that the Department of Interior acted in conformity with its regulations in rejecting Chevron's bids.

III. *Judicial Review of the Secretary's Decision*

Technically, our task is at an end. Having resolved the dispositive issue in the appellant's favor, we could simply remit the parties to the district court for further proceedings. Our decision, however, brings to the fore the issue of whether the Secretary's determination to reject the high bid of a qualified bidder is subject to judicial review. We would ill serve the goals of judicial economy and fairness if we required these parties to spend years in additional litigation only to appear before this court again with a question of law. *See Save the Bay, Inc. v. Administrator of E. P. A.*, 556 F.2d 1282, 1292 (5th Cir. 1977). Accordingly, we turn to the reviewability issue.

The OCS Lands Act neither expressly provides for nor expressly precludes judicial review in this type of case. Review of final agency action is available, however, under section 10 of the Administrative Procedure Act (APA),[9] 5 U.S.C. §§ 701-706 (1976), "except to the extent that -- (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." *Id.* § 701(a) (1976). The issue then is whether the Secretary's action in this case comes within the exceptions of section 701(a).

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9. The pertinent sections of the APA provide:

§ 702. Right of review.
A person suffering legal wrong because of agency action . . . is entitled to judicial review thereof.
§ 704 Actions reviewable.
Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.
§ 706 Scope of review.
The reviewing court shall --
(2) hold unlawful and set aside agency action . . . found to be --
(A) arbitrary, capicious, an abuse of discretion, or otherwise not in accordance with law.

In deciding this question, we have drawn substantial guidance from the Supreme Court's decision in *Morris v. Gressette*, 432 U.S. 491, 97 S.Ct. 2411, 53 L.Ed.2d 506 (1977). The question presented there was the reviewability of the Attorney General's failure to interpose a timely objection under section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c (1976).[10] Mr. Justice Powell, writing for the Court, first reaffirmed the presumption in favor of judicial review: "It is now well settled that 'judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.' " 432 U.S. at 501, 97 S.Ct. at 2418 (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140, 87 S.Ct. 1507, 1511, 18 L.Ed.2d 681 (1967); *accord, Dunlop v. Bachowski*, 421 U.S. 560, 567, 95 S.Ct. 1851, 1857, 44 L.Ed.2d 377 (1975); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410, 91 S.Ct. 814, 820, 28 L.Ed.2d 136 (1971); *Graham v. Caston*, 568 F.2d 1092, 1096-97 (5th Cir. 1978); *Save the Bay, Inc. v. Administrator of E. P. A.*, 556 F.2d at 1293. He then analyzed the "role played by the Attorney General within "the context of the entire legislative scheme,' " 432 U.S. at 501, 97 S.Ct. at 2419, (quoting *Abbott Laboratories v. Gardner*, 387 U.S. at 141, 87 Ct. at 1511), and concluded, on the basis of the statutory language, the legislative history, and the potential severity of the section 5 remedy, that Congress intended to preclude judicial review of the Attorney General's action, 432 U.S. at 504-05, 97 S.Ct. at 2421. The Court focused particularly on

10. Section 5 requires federal preclearance review of voting legislation of covered jurisdictions for conformity with the Constitution and the Voting Rights Act. Review may be obtained through a declaratory judgment action in the District Court for the District of Columbia or by submission of the change to the Attorney General after which the change may be enforced if "the Attorney General has not interposed an objection within sixty days."

the "unusual" and "severe" nature of the section 5 remedy, whose effect is to delay implementation of validly enacted state legislation pending federal review and noted a clear congressional purpose to provide an expeditious alternative to declaratory judgment actions. Judicial review of the Attorney General's failure to object would impermissibly prolong the preclearance procedure and "add acrimony" to the administration of section 5. *Id.* at 504 & n. 19, 97 S. Ct. at 2420-21. Reinforcement for the Court's conclusion was found in the fact that failure of the Attorney General to object did not deprive aggrieved persons of their only remedy; the statute explicitly provides that private suits to bar enforcement of voting legislation are not precluded by such failure. *Id.* at 505, 97 S.Ct. at 2421.

Turning to the role of the Secretary in the entire legislative scheme now before us, we find no persuasive indication that Congress intended to preclude review. We do not think the procedure here can properly be characterized as unusual or severe. Moreover, the APA appears to provide the exclusive means to obtain review of the rejection of a bid by the Secretary.[11] The severity and non-exclusivity of the section 5 remedy were important factors in *Morris* tending to rebut the presumption of reviewability. Nothing comparable is presented here.

Interior has referred us to passages in the testimony of Attorney General Brownell before committees of the House and Senate that were considering the OCS legislation. In his prepared statement, the Attorney General recommended

11. When the Secretary does not intercede, decisions of BLM officers may be appealed to the Board of Land Appeals. 43 C.F.R. § 4.410 (1977). In such cases, the Board decides finally for the Department. Id. § 4.410(3).

that the Secretary of Interior be given latitude in the development of management policies for OCS resources. Such a grant of power would, in his view, reduce the controversy and litigation over day-to-day problems. *Submerged Lands: Hearings on S.J. Res. 13 and Other Bills Before the Senate Comm. on Interior and Insular Affairs*, 83d Cong., 1st Sess. 926-27 (1953); *Submerged Lands: Hearings on H.R. 2948 and Similar Bills Before Subcomm. No. 1 of the House Comm. on the Judiciary*, 83d Cong., 1st Sess. 218-19 (1953). We do not think that in so recommending, the Attorney General intended that the Secretary's actions be unreviewable. In context, it is clear that he meant only that Congress should not attempt to draft detailed rules concerning the management of OCS resources; in view of the unforeseeable problems that would arise, this task was better left to an administrator.[12] This, as the Attorney General observed, is merely a principle of good statutory draftsmanship. Delegation of the discretion to work out details reduces litigation because the administrator can more easily adapt his rules to changed conditions than can the Congress. The mere grant of such discretion does not compel the conclusion that it was intended to be unreviewable.

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12. He testified:

> We think . . . that the principles of good statutory draftsmanship would require the Congress to lay down the basic rules, and, wherever you think there is a matter of great importance, that should be in the statute. So far as the day-to-day management policies are concerned, we believe that it is sensible statutory draftsmanship to leave a considerable amount of discretion and leeway in the administrative office. It is pretty hard to foresee all the questions that are going to come up, especially in a newly developed area of this kind.

Submerged Lands: Hearings on S.J. Res. 13 and other Bills, at 942.

To the same effect is the statement of Secretary of the Interior McKay: "Because of always changing conditions, some of which are unforeseeable, I would hope that the legislation would grant such discretion to the Department of the Interior in management policies as is consistent with the thinking of the Congress." *Submerged Lands: Hearings on H.R. 2948 and Similar Bills*, at 181.

We are similarly unpersuaded by Interior's other arguments. It is quite true, as Interior points out, that the Secretary is permitted, rather than compelled, to issue leases. This fact alone does not commit that action to his unreviewable discretion. *Save the Bay, Inc. v. Administrator of E. P. A.*, 556 F.2d at 1293. Interior contends that because Congress explicitly provided for judicial review elsewhere in the OCS Lands Act,[13] its failure so to provide in this case is telling. But the maxim *expressio unius es exclusio alterius* has been denied conclusive effect in this area. *See Morris v. Gressett*, 432 U.S. at 506 n.22, 97 S.Ct. at 2421. In any event, a rule of statutory construction could not provide the "clear and convincing evidence" necessary to support an inference of nonreviewability. *See Rusk v. Cort*, 369 U.S. 367, 379-80, 82 S.Ct. 787, 794, 7 L.Ed.2d 809 (1962); *accord. Dunlop v. Bachowiski*, 421 U.S. 560, 568, 95 S.Ct. 1851, 1858, 44 L.Ed.2d 377 (1975); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141, 87 S.Ct. 1507, 1511, 18 L.Ed.2d 681 (1967).

Finally, Interior argues that "[t]he determination to accept or reject a high bid involves complex, technical considerations of economics, geology, geophysics, stratigraphy and paleontology, matters which courts are ill-equipped to handle." Brief for Appellants at 23. This argument erroneously assumes that a reviewing court would attempt to substitute its judgment for that of the expert agency. Our task under the "arbitrary and capricious" standard of review is to determine whether the agency has a reasoned basis for its action. *Bowman Transportation, Inc. v. Arkansas-Best*

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13. *See,e.g.*, 43 U.S.C. § § 1335(d) (validation of prior leases), 1337(j) (cancellation of leases), 1333(b) (operational disputes and rights to resources).

Freight System, Inc., 419 U.S. 281, 285-86, 95 S.Ct. 438, 442, 42 L.Ed.2d 447 (1974); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, 91 S.Ct. 814, 824, 28 L.Ed.2d 136 (1971); *State of Florida v. Mathews*, 526 F.2d 319, 324-25 (5th Cir. 1976). That this endeavor may require the consideration of technical and specialized matters does not disable a court from proceeding. *See Greater Boston Television Corp. v. F. C. C.*, 143U.S. App. D.C. 383, 444 F.2d 841, 850 (1970), *cert. denied sub nom. WHDH, Inc. v. F. C. C.*, 403 U.S. 923, 91 S.Ct. 2229, 29 L.Ed.2d 701 (1971).[14]

[3] In sum, we hold that the appellants have not carried their burden to overcome the presumption of reviewability. *Accord, Kerr-McGee Corp. v. Morton*, 174 U.S. App. D.C. 55, 527 F.2d 838 (1975). The appellees may seek on remand to have the rejection of their bids overturned as arbitrary and capricious.[15]

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14. Interior points to *Panama Canal Co. v. Grace Line, Inc.*, 356 U.S. 309, 78 S.Ct. 752, 2 L.Ed.2d 788 (1958) as holding that where the informed judgment of an agency involves technical matters it is unreviewable. The case is not controlling here. In a rather opaque opinion , the court held that "the *initiation* of a proceeding for readjustment of the tolls of the Panama Canal is a matter that Congress has left to the discretion of the Panama Canal Co." *Id.* at 317, 78 S.Ct. at 757 (emphasis added). We think there is a difference between compelling an agency to undertake a task within its authority and reviewing the action of an agency once taken. Moreover, the continued vitality of the *Panama Canal Co.* case as precedent is questionable. It has never been overruled, but neither has the Court ever referred to it in the numerous subsequent cases on reviewability of agency action. We think *Morris v. Gressette*, 432 U.S. 491, 97 S.Ct. 2411, 53 L.Ed.2d 506 (1977), far better reflects the Court's current thinking.

15. Interior urges us to resolve this issue now and spare the parties further litigation. This we cannot do. The district court did not reach the issue and hence there are no findings to review. On the record before us, we cannot hold as a matter of law that Chevron cannot make out a case of arbitrary and capricious agency action.

IV. *Conclusion*

The district court's grant of summary judgment is REVERSED and the cause REMANDED for further proceedings.

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 77 - 2186

D. C. Docket No. CA 75 - 2178 "H" & 75-2179 "H"

CHEVRON OIL COMPANY, ET AL.,

Plaintiffs-Appellees,

versus

CECIL D. ANDRUS, Secretary, Department of the Interior, ET AL.,

Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Louisiana

Before BROWN, Chief Judge, GEWIN and TJOFLAT, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby re-

manded to the said District Court in accordance with the opinion of this Court;

It is further ordered that the plaintiffs-appellees pay to the defendants-appellants the costs on appeal to be taxed by the Clerk of this Court.

February 9, 1979

Issued as Mandate:

ORDER DENYING PETITION FOR REHEARING

United States Court of Appeals
Fifth Circuit
Office of the Clerk

March 8, 1979

Edward W. Wadsworth
Clerk

Tel. 504-589-6514
600 Camp Street
New Orleans, La. 70130

TO ALL PARTIES LISTED BELOW:

NO. 77-2186 - CHEVRON OIL CO., ALLIED CHEMICAL CORP. ET AL v. ANDRUS, ET AL.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

By s/ Salley Hayward
Deputy Clerk

cc: Mr. Ford J. Dieth
Mr. Andrew F. Walch
Messrs. James W. Moorman
Edmund B. Clark
Charles E. Biblowit
Raymond N. Zaonge
Messrs. Wilson S. Shirley
John C. Christian
M. Hampton Carver

REASONS FOR JUDGMENT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CHEVRON USA, INC., ET AL.	CIVIL ACTION
VERSUS	NO. 75-2178 c/w 75-2179
CECIL ANDRUS, ET AL.	
	SECTION "H"

(Filed: May 27, 1977)

REASONS FOR JUDGMENT

These consolidated cases involve a dispute as to whether or not the plaintiffs should have been awarded the drilling rights to 2 offshore tracts.

On May 25, 1975 the Court heard cross-motions for summary judgment and, at that time, granted the plaintiffs' motion and denied the defendants' motion. Written reasons follow:

FACTS

A lease sale of certain offshore tracts was held on February 4, 1975. When the bids were opened it appeared that the plaintiffs had submitted a $2,551,000 bid on tract 37-466 and a bid of $4,531,000 on tract 37-519. Both were high bids for the respective tracts. The Manager of the New Orleans Outer Continental Shelf Office, Bureau of Land Management, Mr. John Rankin, examined the bids, the Geological Survey and the Sale Matrix and recommended that the plaintiffs' bids be accepted. Mr. Curt Berkland, the director of the BLM, likewise recommended acceptance.

The Assistant Secretaary, Land & Water Resources, Mr. Jack Horton, recommended the bids be rejected. The Deputy Undersecretary, Mr. William W. Lyons, concurred in the Assistant Secretary's recommendation and as a result of the Undersecretary's action, by letter dated February 25, 1975 Mr. Rankin, BLM manager in New Orleans, informed the plaintiffs of the decision to reject the plaintiffs' bids.

The reasons given by the Undersecretary were:

> In his February 19 memo, the Director, BLM, further recommended acceptance of the high bid on tracts 342, 498 and 519. I do not find the reasons set forth by BLM in support of its recommendations compelling enough to deviate from the normal reliance on the three estimates of values which are utilized in the post-sale evaluation. Therefore, I recommend these three bids also be rejected.
>
> Further, additional post-sale analysis by the Solicitor's office indicates that on the basis of established post-sale criteria and the manner in which similar bids in past sales have been treated for acceptance/rejection purposes, additional bid rejections are required. Therefore, I recommend rejection of the high bids on tracts 466 and 291, as well as 342, 498 and 519, on the basis of consistency in decision-making.

The post-sale criteria referred to were the compatibility of the plaintiffs' bids to the MRV, DMRV, and AET.

a) The MRV is the means (sic) of an entire range of probable values which is assigned to each tract by a complex Monte Carlo computer technique utilized by the Geological Survey. It represents the Department's pre-sale estimate of value.

b) The DMRV is the MRV discounted by 10% per year for two years to reflect the loss of present value of money arising from the delay which results if a bid is rejected and a tract must be re-offered.

c) The AET is the average of the MRV and the industry bids on the tract calculated by adding all of the industry bids to the MRV and dividing the sum by the total number of industry bids plus one.

No high bid by a responsible qualified bidder which was greater than the DMRV has ever been rejected. And, except in drainage situations, not relevant here, all bids below both the DMRV and the AET have been rejected.

Plaintiffs' bid, like several other bids at the sale, fell below the DMRV but above the AET. For each bid falling in this category, the Department prepared a "Consistency Matrix" comparing such bid to similar bids at previous sales.

The Matrix shows that the plaintiffs bids were roughly in a range wherein the decision by the authorized officer was discretionary and would be overturned only for abuse of dis-

cretion. In the Court's opinion, the salient questions are, who was the "authorized officer", enpowered to make the ultimate decision, and whether there was, in fact a "decision". Prior to a consideration of these central issues, however, certain other matters raised by the parties require attention.

The Government contended both at an earlier motion for judgment on the pleadings and at the summary judgment hearing, that the plaintiffs have no legal right to award of the tracts; that they have not been adversely affected; that they have no standing and that sovereign immunity has not been waived.

These arguments have previously been considered by the Courts and rejected. The Fifth Circuit has held that a disappointed bidder for a federal contract can be adversely affected and has standing. *Hayes International Corp. v. Mc Lucas*, 509 F.2d 247 (5C 1975). Moreover, sovereign immunity is not a valid defense in suits under the Administrative Procedure Act, *Bankers Life & Casualty Company v. Causeway*, 530 F.2d 625 (5C 1976).

This Court further holds that this is not a matter which is solely committed to agency discretion as to bar judicial review, *Hays International, supra.*

Thus, we come to the salient issues.

A.

THE AUTHORIZED OFFICER

The authority of the Secretary of the Interior with respect

to matters concerning OCS leases has been delegated to the Director, Bureau of Land Management. Secretary of the Interior Order No. 2583, 15 Fed. Reg. 5643, as amended March 21, 1962, 27 Fed. Reg. 2862 provides:

> "BUREAU OF LAND MANAGEMENT
> DELEGATION OF AUTHORITY IN CONNECTION WITH LANDS AND RESOURCES
>
> "PART 2 - - AUTHORITY IN SPECIFIED MATTERS
>
> The Director, subject to the provision of Part 1 of this order, is hereby authorized to take all actions, except as otherwise hereinafter provided, with respect to the following matters:
>
> SEC. 2.36 Mineral leases of submerged lands of Outer Continental Shelf. * * *
>
> (b) Mineral leases pursuant to the act of August 7, 1953 (67 Stat. 462: 43 U.S.C. 1331 et seq.), and the regulations under 43 C.F.R., Part 201, [now moved to 43 CFR 3300 et seq.], except that approval by a Secretarial officer must be obtained prior to the issuance of calls for the submission of requests for oil and gas or other mineral lease offerings pursuant to Section 201.20 and the publication of notices of the offer of lands for lease pursuant to Section 201.21."

As permitted by the aforesaid Order,[1] the Director has

1. Order No. 2583 § 1.5 (Supra), as amended February 16, 1954, 19 FR 1021, provides:

redelegated this authority to the Manager, Outer Continental Shelf Office, Mr. Rankin.[2]

No change in that redelegation has taken place. In order for a change in redelegation to be effective, it must be published in the Federal Register. However, the Government argued that under 200 DM 1.3 (Departmental Manual of Regulations) the Secretary does not divest himself of the power to exercise authority, and since Mr. Rankin merely made a recommendation and not a decision, the Deputy Undersecretary was authorized to act.[3] This argument was proposed despite the fact that no change in redelegation was published.

(Footnote 1- continued)

> "SEC. 1.5 Redelegation. The Director may, in writing, redelegate to any officer or employee of the Bureau the authority vested in him by this order, and he may authorize written redelegations of such authority. Each redelegation shall be published in the FEDERAL REGISTER."

2. Bureau of Land Management Order No. 701, as amended December 26, 1972, 38 FR 897, provides:

> "SEC. 4.6 Outer Continental Shelf Leasing: The Manager, Outer Continental Shelf Office, New Orleans, La., is authorized to take all actions in connection with the following:"
>
> "(b) Mineral leases pursuant to the Act of August 7, 1953 (67 Stat. 462; 43 U.S.C. 1331 et seq.), and the regulations under 43 CFR Part 3300 except the issuance of calls for the submission of request for oil and gas or other mineral lease offerings pursuant to 43 CFR 3301.3 and the publication of notices of the offer of lands for lease pursuant to 43 CFR 3301.5."

3. Moreover, the decision of the Deputy Undersecretary constituted "final Departmental action in the matter" and prohibited plaintiffs right to appeal to the Board of Land Appeals. A right which they would have had the manager, and not the Deputy Undersecretary rejected the bid. The Board, under 43 CFR §4.1(3); § 4410 makes the final disposition of mineral rights on the Outer Continental Shelf unless the Secretary takes jurisdiction.

B.

THE DECISION

Thus, the question presented is whether Mr. Rankin, in signifying his approval of the bids, made a "decision", as he is authorized to do and which is not reviewable or reversible by the Secretary delegate, or whether he merely made a "recommendation" which would enable the Secretary delegate to consider the matter. *United States Ex. rel. Accardi v. Shaughnessy*, 347 U.S. 260 74 S.Ct. 499 (1954) provides the authority for the position that where an agency chief delegates authority to a subordinate, that chief may not then "sidestep" or dictate the decision of the subordinate. As the Court stated,

> . . . the recipient must exercise his authority according to his own understanding and conscience.

347 U.S. at 267, 74 S.Ct. at 503.

This rule of law was followed and noted approvingly in *U.S. v. Nixon*, 418 U.S. 783, 94 S.Ct. 3090 (1974). The case of *Superior Oil Co. v. Udall*, 409 F.2d 115 (C.D.C. 1969) offers further insight. In that case, authored by then Judge Warren Burger, it was held that Mr. Rankin made a "decision" in announcing that a bid was unacceptable because it was unsigned.

It is the Government's contention that *Accardi*, *Nixon* and *Superior* are inapplicable because Mr. Rankin made only a recommendation in this case. However, that argument is not supported by the facts in this case. Semantics aside, whether the action of Mr. Rankin was a "decision" or "recommendation", it was clear indication that it was his independent judgment that the bids should have been approved. That conclusion is inescapable. Accordingly, the Court found that Mr. Rankin, in indicating his approval of the bids, made the independent decision which was delegated to him as the authorized officer by the Secretary, and the Secretary did not have the right to overrule that decision in the absence of a specific regulation. Since no such regulation exists, Mr. Rankin's decision must be regarded as final and for that reason, summary judgment was, in both cases, GRANTED in favor of the plaintiffs.

New Orleans, Louisiana, this 27th day of May, 1977.

s/ R. Blake West
UNITED STATES DISTRICT
JUDGE

JUDGMENT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CHEVRON OIL COMPANY, ALLIED CHEMICAL CORPORATION, SONAT EXPLORATION COMPANY, THE OFF-SHORE COMPANY, TRANSOCEAN OIL, INC. and UNIDEL OIL CORPORATION	CIVIL ACTION
VS	NO 75-2178
CECIL ANDRUS, Secretary, Department of the Interior; KENT FRIZZELL, Former Acting Secretary, Department of the Interior W. W. LYONS, Deputy Under Secretary, Department of the Interior; ROLAND G. ROBINSON, JR., Deputy Assistant Secretary, Land and Water Resources, Department of the Interior; and JOHN L. RANKIN, Manager, New Orleans Outer Continental Shelf Office, Bureau of Land Management, Department of the Interior	SECTION "H"
	CONSOLI-DATED WITH
CHEVRON OIL COMPANY, ALLIED CHEMICAL CORPORATION, SONAT EXPLORATION COMPANY, and THE OFFSHORE COMPANY	CIVIL ACTION
VS	NO. 75-2179
CECIL ANDRUS, Secretary, Department of the Interior; KENT FRIZZELL, Former Acting Secretary, Department of the Interior; W.W. LYONS, Deputy Under Secretary, Department of the Interior; ROLAND G. ROBINSON, JR., Deputy Assistant Secretary, Land and Water Resources, Department of the Interior; and JOHN L. RANKIN, Manager, New Orleans Outer Continental Shelf Office, Buraru of Land Management, Department of the Interior	SECTION "H"

JUDGMENT

These consolidated cases came on for hearing on cross-motions for summary judgment on May 25, 1977, and after hearing argument, the Court took the matter under submission.

Now, therefore, the court having considered the aforesaid motions, the pleadings, affidavits, memoranda, and exhibits of record and having determined that there is no genuine issue of material fact, and for written reasons entered on May 27, 1977 ;

IT IS ORDERED, ADJUDGED AND DECREED that:

(a) In the proportions set forth opposite their names, Chevron U.S.A., Inc., formerly Chevron Oil Company, 35%; Allied Chemical Corporation, 25%; Sonat Exploration Company, 20.83340%; The Offshore Company, 4.16660%; Transocean Oil, Inc., 10%; and Unidel Oil Corporation, 5%, are entitled to an oil and gas lease on Tract No. 37-519, Matagorda Island, Block 699, on the basis of the bid submitted by the said plaintiffs.

(b) Defendants, through the Manager of the New Orleans Outer Continental Shelf Office, Bureau of Land Management, Department of the Interior, Mr. John L. Rankin, or his successor in office, be and they are hereby ordered, upon receipt from plaintiffs of the bonus bid of $4,531,000.00 together with the first year's rental, forthwith to execute and issue on behalf of the United States of America and in favor of plaintiffs (in the proportions set forth opposite their names above) an oil and gas lease (to be dated in accordance with 43 CFR Section 3302.7) covering the aforesaid tract

37-519, Matagorda Island, Block 699.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that:

(a) In the proportions set forth opposite their names, Chevron U.S.A. Inc., formerly Chevron Oil Company, 40%; Allied Chemical Corporation, 30%; Sonat Exploration Company, 25%; and The Offshore Company, 5%, are entitled to an oil and gas lease on Tract No. 37-466, Matagorda Island, Block 602, on the basis of the bid submitted by said plaintiffs.

(b) Defendants, through the Manager of the New Orleans Outer Continental Shelf Office, Bureau of Land Management, Department of the Interior, Mr. John L. Rankin, or his successor in office, be and they are hereby ordered, upon receipt from plaintiffs of the bonus bid of $2,551,000.00, together with the first year's rental, forthwith to execute and issue on behalf of the United States of America and in favor of Plaintiffs (in the proportions set forth opposite their names above) an oil and gas lease (to be dated in accordance with 43 CFR Section 3302.7) covering the aforesaid tract 37-466, Matagorda Island, Block 602, each party to bear its own costs.

New Orleans, Louisiana this 31st day of May, 1977.

s/ R. Blake West
UNITED STATES DISTRICT
JUDGE